PRIVY COUNCIL REPORT

YAHAYA BIN MOHAMAD v. CHIN TUAN NAM

[P.C. (Lord Cross of Chelsea, Lord Simon of Glaisdale, Lord Kilbrandon, Lord Edmund-Davies and Lord Fraser of Tullybelton) July 25, 1975]

[Privy Council Appeal No. 25 of 1973]

Practice and Procedure — Appeal — Question of fact — Negligence — Traffic accident — Whether appeal court can interfere with finding of trial judge.

In this case the appellant had claimed damages for injuries sustained by him arising out of a collision between the appellant's bicycle and the respondent's motor car at the Bakar Arang/Sungei Patani Road. The crucial issue in the case was on which side of the line the collision took place, the appellant alleging that he was riding properly on his left-hand side when the appellant's car approaching in a zig-zag manner crossed from its left-hand side to the right-hand side and knocked into the bicycle, while the respondent alleged that he was driving on the correct side of the road and the bicycle swerved into the path of the oncoming car. The learned trial judge relied on the evidence of the appellant and a witness Omar bin Mat Isa and the evidence of the sketch plan and police photographs and held that the appellant was at all times riding properly on his left hand side and that the accident occurred on that side of the road. On appeal the Federal Court held that the learned trial judge had drawn wrong inferences from the evidence of the sketch plan and police photographs and they allowed the appeal and dismissed the claim. The appellant appealed to the Privy Council.

Held, allowing the appeal: (1) as in this case the learned trial judge had based his finding on the evidence of the plaintiff and his witness, his finding should not have been disturbed;

(2) this was not one of those rare cases where an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

Cases referred to:-

(1) *San Cheong Choy & Ors.* v. *Yuson Bien* [1963] M.L.J. 235.

(2) *Abdul Majid* v. *Pahang Lin Siong Motor Co. Ltd.* [1963] M.L.J. 346.

(3) *Yew Chek Hwa* v. *Mathews* [1970] 1 M.L.J. xvi.

(4) *Sia Heng Hong* v. *Lee King Soong* [1970] 1 M.L.J. xvi.

(5) *Foong Nan* v. *Sagadevan* [1971] 2 M.L.J. 24, 26.

(6) *Jefford & Anor.* v. *Gee* [1970] 2 W.L.R. 702, 703.

(7) *The Hontestroom* [1927] A.C. 37.

(8) *Watt or Thomas* v. *Thomas* [1947] A.C. 484 at 487-8.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

George Newman (*Singh Bhar* with him) for the appellant.

Nigel Murray (*Lim Kean Chye* with him) for the respondent.

In the court of the first instance, *Triptipal Singh* appearing for the plaintiff and *Lim Ewe Hock* for the defendant, the following judgment was delivered on August 19, 1972:

Syed Agil Barakbah J.: This is a claim for general and special damages by the plaintiff who was a crab catcher by profession prior to an accident which occurred on September 12, 1968, at about 12.10 a.m. According to the Agreed Statement of Facts, the plaintiff was cycling along Bakar Arang Road towards Sungei Patani town. The defendant was driving a motorcar No. K9192 and proceeding towards the opposite direction. There was a collision between the said motorcar and the plaintiff's bicycle. The plaintiff alleges that as a result of the accident he suffered injuries and as a result his right leg is shortened by one inch and he walks with a limp. The plaintiff further alleges the accident occurred due to the negligent driving of the defendant. The defendant, on the other hand, denies negligence and maintains that the accident was solely caused by or contributed to by the negligence of the plaintiff himself.

Mr. Triptipal Singh appeared for the plaintiff and Mr. Lim Ewe Hock for the defendant.

The facts are simple but the evidence conflicting since both sides gave different versions.

According to the plaintiff, he was cycling about 3 feet away on his side of the road towards Sungei Patani town to get baits for catching crabs. When he arrived in front of the Esso petrol station he saw the headlights of a motor vehicle coming from the opposite direction about 190 feet away, in a zigzag manner. He did not sense any danger and carried on cycling along the road. When the vehicle was about 40 feet or so away from him, it zigzagged a second time, encroached into his path and knocked into him. He became unconscious and recovered later in the hospital. His only witness, Omar bin Mat Isa, testified that before the accident he was walking home from Sungei Patani town on the left side of the road. He saw the plaintiff cycling on the other side of the road towards Sungei Patani. After he had passed him he heard the sound of vehicles colliding. He turned round and saw a motorcar diagonally across the middle of the road. He also saw the plaintiff had fallen in front of the car near its offside. The plaintiff was lying on his (plaintiff's) side of the road about 3 feet away from the left edge. The bicycle had fallen in front of the plaintiff about 20 feet away. He further said the car was still moving on the road and proceeded towards a drain on the left side as one faces Bakar Arang. It came to a stop when one of its wheels went into the drain. The defendant then came out from the driver's seat. He noticed two other persons in the car. Then he and one Indian man who reached the scene later helped to carry the plaintiff to the side of the road.

The defendant testified that he was driving his Opel Kapitan saloon alone that morning at over 20 m.p.h. along the main road. From a distance he saw the light of a bicycle coming towards him on the left side of the road about 100 yards. He continued driving. When his car was about 20 feet away from the bicycle, the cyclist suddenly rode across the road towards the defendant's right. The defendant swerved to the left to avoid the cyclist but the cyclist was so close to him that the front offside lamp of the car knocked the bicycle and the cyclist's right leg. One of the wheels of his car landed in a hole on the left side of the road. He got down from the car, approached the cyclist who was lying on the road bleeding from the head and lifted him to a sitting position. An Indian came and on his request moved the cyclist to the side of the road. The defendant went to telephone the police at a Shell filling station opposite. He

denied ever seeing Omar at all that morning. The defendant when tested in cross-examination revealed a vital contradiction to his own testimony. In his police report made about forty minutes or so after the accident, he said on reaching in front of the Esso station he saw a male cyclist coming from the right side of the road from Bakar Arang going towards Sungei Patani. When the cyclist was near him he crossed towards the left side of the road and collided with his car. The cyclist fell down. He got out of the car, carried the cyclist and placed him by the side of the road. In his evidence, as stated earlier, the defendant stated the reverse. He appeared to be confused as to the plaintiff's position before the accident. If the version in his report which he made when the accident was still fresh in his mind, though perhaps he could have been excited, is true, then his car could not have knocked into the plaintiff's right side causing the injuries on the right. Apparently in the circumstances the injuries would have been sustained on the plaintiff's left side.

On that issue alone the defendant's version in rebuttal of the plaintiff's allegation is vague. Nevertheless, it is only proper to examine the other evidence available considering the conflicting stories given on either side, before making any definite conclusion. The test applicable is as approved by the Court of Appeal in *San Seong Choy & Ors.* v. *Yuson Bien*,[1] namely, where the parties on either side tell conflicting stories, the photographs, plans and measurements of the scene and the nature of the damage to each vehicle provide the most reliable guide by which such evidence can be tested. The first that should be examined is the sketch plan and the measurements appearing on pages 5 and 6 of the Agreed Bundle of Documents, Ex. P1. The stretch of road on which the accident occurred appears to be straight with a slight bend to the left towards Tikam Batu. It is 23 feet 6 inches wide with centre line marked. The glass fragments from the defendant's car, a shoe belonging to the plaintiff and the plaintiff's bicycle lying across the road are all shown to be on the left-hand side of the road, *i.e.* the defendant's side, as one faces towards Tikam Batu. So is the defendant's motorcar which has its front nearside wheel in a drain lying on the grass verge facing Tikam Batu. The bicycle is lying about 20 feet 6 inches away from the shoe, 8 feet away from the left side of the road (marked B). Its rear wheel (G) is 27 feet 10 inches from the right front wheel of the motorcar and 31 feet from the right rear wheel. The plaintiff's shoe is 7 feet 10 inches from the left side of the road. However, a blood spot marked at 'L' is in the plaintiff's portion of the road and is 5 feet 8 inches from the right edge of the road. Thereafter the front wheel of the plaintiff's bicycle is found on the right grass verge 3 feet 3 inches away from the right edge. The seat of the bicycle is also found on the same side at 'F', 2 feet 6 inches away from the right edge.

These alone do not tell much of how the accident happened without recourse to the damages suffered by the vehicle and the photographs. The damage to the defendant's car as described in the Certificate of the Road Transport Department Examiner (page 11 of Ex. P1) is all on the offside. This is also evidenced by photographs Nos. 7 and 8 on page 8 of Ex. P1. The bicycle is also damaged on its right-hand side with its body bent slightly towards the right as shown in photographs Nos. 1 and 5. The front wheel though detached from it does not show any damage. The apparent damage which would indicate the point of impact appears to be the fork.

The sum total of all these pieces of evidence put together shows, to my mind, that the offside front head lamp of the defendant's motorcar had come into contact with the right-hand side of the plaintiff's bicycle probably at its fork causing the front wheel to be dislodged and the seat to be flung out to the right grass verge of the road. This version is claimed by both the plaintiff, as corroborated by Omar, and the defendant in his evidence which, as I have stated, are in conflict with his police report. The main question is in what manner did the accident take place? There are two probable versions, namely: —

(1) That the defendant's car zigzagged and went across to the wrong side of the road and knocked into the plaintiff who was cycling straight ahead on the left side towards Sungei Patani. That is the plaintiff's version.

(2) That the plaintiff rode his bicycle diagonally across the road from the defendant's left to the right on the path of the oncoming car which when trying to avoid him by swerving to its left knocked into the right side of the bicycle. That is the defendant's version.

Taking into consideration all the evidence before me in the circumstances of the case, I am of the considered opinion that the plaintiff's version is more probable. Even if I put aside the defendant's conflicting stories, and the plaintiff's corroborated version, the following factors support my contention: —

(1) The blood spot on the plaintiff's side of the road clearly indicated without any *iota* of doubt that the plaintiff had fallen on or near the spot.

(2) This is further supported by the finding of the front wheel of the bicycle and the seat well on the plaintiff's side of the road on the grass verge.

(3) The brake marks made by the motorcar as shown in photograph No. 3 on page 8 of Ex. P1 point clearly that the said motorcar had come from the plaintiff's side of the road, *i.e.* from its wrong side. The two brake marks appear to emerge from the plaintiff's side of the road as one faces Tikam Batu. That tends to support the evidence of Omar who saw the defendant's car first diagonally across the centre of the road on the plaintiff's side and then moving to its left back into the defendant's side to stop with one of its wheels in the drain. In the light of this glaring evidence, to my mind, the impact took place well on the plaintiff's side. Although the glass fragments, the shoes and the bicycle are all on the other side, they are near the centre white line. It is natural during a sudden and unexpected accident of this nature for a heavier vehicle, *i.e.* the motorcar, which was moving, to push the bicycle, a very much lighter vehicle, forward by the force of the impact. On the other hand, if the defendant's version were to be considered, I would expect

from the evidence before me that the accident would have taken place well on the defendant's side of the road. According to him, the plaintiff suddenly crossed the road from the defendant's left to the right and in an attempt to avoid the plaintiff he swerved his motorcar to the left but knocked into the plaintiff. As evidenced by the sketch plan, the photographs and the surrounding facts, I am of the opinion that his version in the circumstances is not in the least probable.

I have no hesitation therefore to conclude on the balance of probability that the defendant was negligent.

The next point to consider is whether the plaintiff contributed to such negligence. Although in the early part of cross-examination the plaintiff said he was cycling about 3 feet from the left side of the road and could have gone nearer, he did not sense any danger when he first saw the motorcar zigzagging about 190 feet away. The road was clear at that time of the morning and there was no other vehicle about according to evidence. It is only reasonable in the circumstances for him not to expect the car to come to his side of the road as he saw it proceed in a normal manner after the first zigzag. But when the car was about 40 feet away, it zigzagged a second time and on the spur of that moment he rode his bicycle about a foot or so nearer his side of the road. It was at this juncture that the impact took place. I do not think in the circumstances that the plaintiff could have reasonably foreseen that by proceeding along his side of the road and not going further on the grass verge that he would cause danger to himself. I hold therefore that he is not guilty of any negligence or contributory negligence.

As regards liability, the plaintiff, as a result of the accident, suffered six injuries, among which were an open fracture dislocation of the right knee with the fibula displaced medially; fracture of the right femur (midshaft) and severe cerebral concussion. He was hospitalised for about four months and after discharge he had to attend hospital occasionally as an outpatient. His right leg has been shortened by one inch as a result of the fracture of the right femur.

The Consultant Surgeon, Mr. C. K. Young, who examined the plaintiff on May 19, 1972, (see his report Ex. P3 which was produced by consent) stated that the plaintiff walked with a bad limp on the right and the right knee in straight position but not distressed with pain. The spine showed moderate scoliosis and the para-vertebral muscles of the lumbar spine were taut. The right side of the pelvis tilted upwards. The right leg showed two inches apparent and one inch true shortening. The right femur showed marked anterior and outward bowing. The right thigh showed 1¼ inches and calf ½ inch wasting. The right knee showed 5 degrees flexion deformity and a flexion movement of only 10 degrees. The plaintiff has a fairly limited capacity to do work using both legs. That means that any occupation requiring him to walk for a long distance will give him pain in the knee. He will not be able to squat with both legs bent but will have to do so with one leg stretched, which is not an easy task. His chances of working as a crab catcher is most unlikely because he would find it difficult to climb up and down river banks for the purpose of catching crabs. He has in fact developed osteo-arthritis of the right knee which will result in chronic symptoms, namely, pain, stiffness and weakness of the adjacent muscles. It will get worse in time. As the knee is getting more painful he would require to get the two bones, *i.e.* the femur and the tibia joined together. In that case the right leg would be shorter still by about another inch or so because the cartilege will have to be removed before the bones can be joined together. From the nature of the injuries, particularly the ones described above, the patient must during earlier treatment have immobilisation in plaster cast and reduction of fracture dislocation of the knee and prolonged physiotherapy. It is clear the plaintiff must have suffered considerable pain.

The plaintiff is 45 years of age. I estimate his daily income in catching crabs, considering the seasons, weather, etc., to be an average of $5 per day, *i.e.* about $150 a month.

Generally when a person gains his livelihood by some kind of manual work and suffers injury which diminishes his dexterity, it is normally necessary for him to take up some other occupation. It is notoriously difficult for a manual worker to change into any form of occupation except the least skilled and the worst paid. His injuries would almost certainly disqualify him for hard and active work. If at all, he may be able to perform much lighter work not involving the use of his legs and squatting and, in the circumstances, will not be able to earn as much as before. That will entail probable loss of earnings for which I award a sum of $10,422. This in my view is fair and reasonable.

I would refer to a number of comparable cases as guidance, and in particular to *Abdul Majid* v. *Pahang Lin Siong Motor Co. Ltd.*,[2] a decision of the Court of Appeal. The appellant in that case was a 23 year old hawker who suffered injuries which are similar to those suffered by the plaintiff in the present case, including one inch shortening of the right leg. The award of $10,000 for general damages was increased to $18,000 on the ground of misapprehension of facts; the court of first instance having paid insufficient regard to the question of probable loss of earnings. That was in 1963.

The other is a more recent Singapore case of *Yew Chek Hwa* v. *Mathews*,[3] the facts of which are also quite similar to the present case. Tan Ah Tah F.J. awarded the sum of $18,900 as general damages made up of $12,000 for pain and suffering and loss of amenities and $6,900 for actual loss of earnings.

In *Sia Heng Tong* v. *Lee King Soong*,[4] Pawan Ahmad J. awarded to a 29 year old rubber tapper whose earning was fixed at $120 per month, a sum of $22,476 under the head of general damages, the sum being made up of $15,000 for pain and suffering and loss of amenities and $7,476 for loss of future earnings. The facts involve quite similar injuries as the present one including one inch shortening of the right leg.

As regards special damages, paragraph 9(ii),(iii), (iv) and (v) are agreed upon. This comes to $260.

(Item (iv) being $90 instead of $250). As regards item (i), I assess the loss of income from September 12, 1968 to July 1, 1969 at $5 per day, *i.e.* $1,440. The total sum under special damages is therefore $1,700.

Having regard to the above and bearing in mind the increase in the cost of living, I award the sum of $22,422 as general damages made up as follows:—

(1) $10.422 for loss of future earnings;

(2) $12,000 for pain and suffering and for loss of amenities.

There is therefore judgment for the plaintiff in the sum of $22,422 in respect of general damages, and the sum of $1,700 in respect of special damages and costs.

With regard to interest claimed, I award 6% per annum on $12,000 for pain and suffering and loss of amenities but not on the sum of $10,422 for loss of future earnings. (See *Foong Nan* v. *Sagadevan*,[5] per Ong C.J.). The interest should run from the date of service of the writ to the date of trial. As regards special damages, it should be with interest at half the rate, *i.e.* 3% per annum from the date of accident to the date of trial. (See *Jefford & Anor.* v. *Gee*,[6] as approved in *Foong Nan* v. *Sagadevan, supra*).

From the above judgment the defendant appealed to the Federal Court. Lim Ewe Hock appeared for the appellant and Triptipal Singh for the respondent. The following judgment was delivered in the Federal Court on April 14, 1973:

Ong Hock Sim F.J.: This is an appeal from the judgment of the High Court at Alor Star awarding damages to the respondent who was knocked down while riding his cycle by motor-car No. K. 9192 driven by the appellant.

On September 12, 1968 at about 12.30 a.m. (given as 12.10 a.m. in the Agreed Statement of Facts) the respondent was cycling from Bakar Arang towards Sungei Patani. The appellant was driving his motor-car from Sungei Patani in the direction of Bakar Arang. A collision occurred between the two. The only issue to be decided is whose version is more probable adopting the test in *San Seong Choy & others* v. *Yuson Bien*.[1]

The main ground of appeal was that the learned judge drew wrong inferences from the evidence of the sketch plan and the damage to the vehicles in holding the respondent's version to be more probable. It was urged also if the accident happened in the manner described by him, the cycle, the car and the glass fragments should not be where they are shown in the sketch. These two and another ground that the judge erred in holding that there was a contradiction between the Police report and appellant's evidence in court will be dealt with later in the examination of the evidence produced.

It is convenient however here to dispose of another ground and to say it is agreed that there is no evidence whatever to support the finding that the brake marks on photograph 3 of Exhibit P1 were made by the motor-car and for the conclusion that impact took place on respondent's side. The other inference as to the front wheel and the seat being on the respondent's side of the road had been explained by the judge himself when he said that the front wheel was probably dislodged by the car knocking the cycle at its fork, causing at the same time the seat to be flung out to the right grass verge. The blood spot only indicated the respondent might have fallen there but would not be conclusive as to the place of impact.

According to the respondent, he was cycling along his left side about 3 feet from the grass verge. He saw the headlights of a motor vehicle coming from the opposite direction about 191 feet away in a zigzag manner. When some 40 feet away, it zigzagged a second time, encroached onto his path and knocked into him. The car knocked into the front wheel of the bicycle, on the front part. At the time of collision, the car was at an angle, diagonally across towards the grass verge on respondent's side of the road. The respondent called a witness, Omar bin Mat Isa. In his judgment, the learned judge said "Omar testified that before the accident he was walking home from Sungei Patani town on the left side of the road. He saw the plaintiff cycling on the other side of the road towards Sungei Patani." It does not appear that the evidence in court is clear on this point. The witness is recorded as saying: "At the time of the accident, I was walking from Sungei Patani town towards my house. I was *walking on the left-hand side* of the road. (*Witness corrects evidence*)." No note was made what was the nature of the correction. I am inclined to think that the witness changed his testimony to say he was walking along his right-hand side of the road, following section 71 of the Highway Code which advises pedestrians: "At night it is most important to walk facing the traffic and not with your back towards it." I shall refer to this aspect of the evidence later. He went on to say he saw the respondent cycling on the other side of the road going towards Sungei Patani. After passing he heard the sound of a collision and turned round. He saw a car diagonally across the road in the middle of the road, and the plaintiff in front of the off-side of the car. The respondent was about 3 feet from his left edge of the road with the cycle 20 feet further in front. When he turned round and saw all this, the car was still moving and went towards the drain on the other side, that is, the left side of the road as one faces Bakar Arang.

The appellant gave a version diametrically opposed to that of the respondent. According to him, he was proceeding towards Bakar Arang. He saw ahead of him the light of a bicycle coming from Bakar Arang on his (appellant's) side of the road. When it was 20' away, the cyclist suddenly rode across in front of his car to go towards appellant's right side of the road. He swerved to his left but was unable to avoid knocking the cyclist. The off-side head lamp knocked into the cycle. In cross-examination the appellant said: "My whole case is that the cyclist was travelling on my side of the road and he moved across to my right. It was not *so* (true?) cyclist was on my right side of the road and crossed to my left. (Ex. P1 — pages 3 and 4 of report referred)." I may here refer to the relevant portion of the report and translation. "Apa bila sampai tentang Esso dapat satu laki2

penunggang basikal datang dari arah Bakar Arang menghala ka Sungei Patani mengikut jalan di-sabelah *kanan jalan*, apa-bila dekat dengan saya ini penunggang basikal potong ka-kiri Jln. dan bertoh dengan M/Car saya." "On reaching in front of the Esso station, I saw a male cyclist coming from (riding on) the right (-hand) side of the road from Bakar Arang going towards Sungei Patani. When the cyclist was near me, he crossed towards the left side of the road and collided with my car."

The judge was quite correct when he said that the main question is in what manner the accident took place. There is the respondent's version, namely that appellant's car zigzagged and went across to the wrong side and knocked into the plaintiff who was cycling straight ahead on the left side facing Sungei Patani. Then there is the appellant's version, namely that the respondent rode his bicycle diagonally across the road from the appellant's left to the right on the path of the oncoming car which when trying to avoid him by swerving to its left knocked into the right side of the bicycle.

The judge was also correct in holding that the offside front head lamp of the motor car came into contact with the right-hand side of the bicycle. The Certificate of the Road Transport Department Examiner of the damage to the motor-car, photographs of the cycle and the injuries sustained by the respondent fully support this finding. Where however the judge erred, in my view, is where he concluded that the appellant when tested in cross-examination revealed a vital contradiction to his testimony. I have already quoted the relevant portion of the report and translation with bracketed interpolations of my own and also the cross-examination. With respect, I am unable to find any contradiction between them and his evidence in court. There was no confusion as to the plaintiff's position and the inference drawn by the learned judge that "If the version in his report which he made when the accident was still fresh in his mind, though perhaps he could have been excited is true, then his car could not have knocked into the plaintiff's right side causing the injuries on the right. Apparently in the circumstances the injuries would have been sustained on the plaintiff's left side." arose from the judge's taking the view that the respondent was riding along his *proper* side of the road when in fact he was riding on the *right*-hand (incorrect) side of the road from Bakar Arang to Sungei Patani.

I have earlier said I would return to Omar, the witness. If he was walking along the right-hand side of the road towards Bakar Arang, then his evidence "As I was walking, I saw plaintiff (the respondent) cycling on the other side of the road and going towards Sungei Patani" would confirm what the appellant said in his police report. The witness can hardly be believed when he lied so brazenly. Turning round, after hearing impact, he said, he saw the car diagonally across at an angle of 45° in the middle of the road, plaintiff (the respondent) in front of the offside about 3' from left edge, the cycle 20 feet further away and the car *still moving* towards the drain on the left side. How the car did that reversal of direction, when it should have charged straight on after impact, if plaintiff was at the time only 2' from his left grass verge, and turned round to go to the other side without hitting the guide (mile) stones and electric lamp post (see sketch plan), is not in evidence. It is, I think, quite unexplainable. In cross-examination, this witness continued to lie. He said "The bicycle was on the plaintiff's side of the road" when the sketch plan showed its rear wheel as 8' from the appellant's side and 15½' from the plaintiff's. The broken glass was, he said, also on plaintiff's side. The learned judge had himself found "The glass fragments from the defendant's car, a shoe belonging to the plaintiff and the plaintiff's bicycle lying across the road are all shown to be on the left hand side of the road, *i.e.* the defendant's side, as one faces Tikam Batu." This could not be so if, as the respondent claimed, he was knocked about 2' from his left grass verge. He had even exaggerated in his evidence and said *"Before the collision, the car had encroached into my side of the grass verge."* If this was so and if he was cycling straight ahead on his left side, the car would have to turn out from the grass verge and would knock him on his left side. It has to be remembered that the second zigzag when the car and bicycle were 40' apart was the one which caused the collision. There was no traffic at the time and I do not think it matters whether the appellant was travelling along the centre or more on the other side. The respondent has to substantiate his story. It was for him to prove his case. That, in my view, he failed to do and the physical evidence photographs, plans, measurements and the damage do not bear out his story.

Paragraph 6 of his Statement of Claim stated "the Defendant's car knocked into the Plaintiff's bicycle and pushed it to the centre of the road". This would seem to detract from his version in court. The unreliability of his witness has been demonstrated. I find therefore his version unacceptable on the balance of probabilities. The appellant was penalised for one *"vital contradiction"*, which I think was due to a misreading of the report and to the mistranslation. I am of the opinion that his version is in the light of the sketch plan and other evidence the more probable.

I would allow the appeal and set aside the judgment with costs here and in the court below. The deposit will be refunded to the appellant. The sum of $24,122 paid into court pending appeal will also be returned to the appellant.

Azmi L.P. and **Suffian F.J.** concurred.

From the above decision the respondent appealed to the Privy Council. In the Privy Council the following judgment was delivered:

Lord Edmund-Davies (delivering the judgment of the Board): This is a plaintiff's appeal from the judgment of the Federal Court of Malaysia given on April 14, 1973, whereby it allowed the defendant's appeal from the judgment in the plaintiff's favour of Syed Agil Barakbah J. sitting in the High Court in Malaya on August 19, 1972. The substantial question raised by the appeal is whether the Federal Court was entitled to reverse the finding as to liability arrived at by the learned trial judge.

The action arose out of a collision between the plaintiff's bicycle and the defendant's motor-car on the

Bakar Arang/Sungei Patani road at about 12.10 a.m. on September 12, 1968, as the result of which the plaintiff sustained personal injuries, of which the most important were fractures of the right knee and right femur. The road was 23½ feet wide and had a central white dotted line. The plaintiff was riding his bicycle towards Sungei Patani, the defendant driving in the opposite direction, and each had the proper lights. The crucial issue in the case was on which side of the line the collision occurred, the learned trial judge holding that the plaintiff was at all times riding properly on his left-hand side, the Federal Court concluding that he was over on the defendant's side and that it was on that side of the road that the accident occurred.

It is not unimportant to note at the outset how the parties had before trial presented their respective cases in their pleadings. In the Statement of Claim it was asserted that, as the plaintiff was riding about 4 feet from the grass verge on his left, he saw the defendant's car approach in a zig-zag manner, "travelling... from the left hand side of the road to the right hand side", and that as a result, "the defendant's car knocked into the plaintiff's bicycle and pushed it to the centre of the road. The defendant's car went back to its correct side of the road and landed on a ditch". On the other hand, the motorist averred in his Defence that he kept throughout on his own side of the road, but that the plaintiff was negligent in the following respect (among others):

"(iii) Failing to *keep* his proper side of the road.

(iv) Suddenly and without any warning swerving into the path of the defendant's oncoming car...."

At the trial the plaintiff testified that the car was about 191 feet away when he first saw its headlights "coming in a zig-zagging manner" into his side of the road and then back to its own side; that when he was about 3 feet from his nearside verge and the car about 40 feet away it came into his side and knocked into the front wheel of his cycle, adding that, "At the time of collision the car was at an angle, diagonally across the road towards my left grass edge." The defendant's evidence was that he was driving his car about 3 feet from his grass verge at "over 20 m.p.h." when he saw a bicycle light coming towards him on his side and about 100 yards away. Confronted by what must surely have appeared a situation of great danger, what did the defendant do to avert a seemingly inevitable collision? Did he immediately brake or swerve or take any other avoiding action? This was his evidence:

"I continued driving on. When my car was about 20 feet away from the bicycle the cyclist suddenly rode across the road to my right. I found he was so close to me that I swerved to my left in order to avoid the cyclist. I knocked into his bicycle at the cyclist's right leg. The front offside headlamp knocked into the cyclist. After the collision one of the wheels of my car landed into a hole on the left side of the road. I then got out of my car. I went to the cyclist and lifted his body from the lying position to a sitting position."

A little later he added that at the time of the impact he saw the bicycle "thrown away towards the front" and that when he got out of his car "the bicycle was then lying near the centre white line on my side of the road".

In deciding between these widely conflicting versions, the learned trial judge was assisted by other evidence, both oral and documentary. Omar Bin Mat Isa, who had known the plaintiff for a few years and whom the defendant said he knew by sight and had no reason to think bore him any grudge, testified that he was walking on his left side of the road and proceeding towards his home at Bakar Arang; that as he proceeded on his way he saw the plaintiff cycling on the other side of the road and going towards Sungei Patani; that after they had passed each other, he heard a collision at his rear, turned around, and saw the defendant's car "diagonally across the road. It was in the middle of the road." Omar continued:

"I saw the plaintiff in front of the car. He had fallen in front of the car near the offside of the car. The plaintiff was on his side of the road about 3 feet away from the left edge of the road. The bicycle was further in front of the plaintiff about 20 feet away. I approached the plaintiff. He was lying down on the road. The car was still moving on the road and went towards the drain on the left side as one faces Bakar Arang. When one of the wheels went into the drain, it came to a stop.... There was blood on the road at the place where I saw the plaintiff lying."

His evidence was strongly challenged by counsel for the defence, but he repulsed suggestions that he never saw the accident, that the car had never been well out into the road and pointing diagonally towards its nearside, and that he did not arrive at the scene until "well after the accident".

When the police arrived on the scene, they proceeded to make a sketch plan and took photographs of the car and the cycle *in situ*, and after daylight they took further photographs of the vehicles and of the *locus*. These, together with a key to the police photographs, were all put in as agreed documents at the trial. The sketch, not to scale, indicated that, on leaving the carriageway, the car had traversed a 15-foot grass verge and had then come to rest with the front nearside wheel in a drain. On the defendant's side of the central white line lay the cycle (minus its front wheel and cycle seat) and the plaintiff's shoes. On the grass verge, lying to the plaintiff's left, were the cycle seat and front wheel. Five feet eight inches from the plaintiff's nearside verge the road was stained with blood, and over an apparently wide area glass had been scattered over both sides of the white line (the car's front windscreen, and offside headlamp had been smashed), more of it lying on the defendant's correct side. Examination of the car also showed slight denting of the offside of the front bumper bar and the offside front mudguard, and on the offside of the cycle was a paint mark.

Of the eight police photographs the most important is the one described in the attached key as "showing the road from Sungei Patani leading to Bakar Arang and also brake marks". Junior counsel for the respondent informed the Board that it, together with another showing the blood mark on the road, had been photographed by the police very early on the morning after the accident. The importance of the brake marks is that they start well on the defendant's wrong side of the white line and swing away in an arc towards his correct side, and the trial judge observed that they

"tend to support the evidence of Omar who saw the defendant's car first diagonally across the centre of the road on the plaintiff's side and then moving to its left into the defendant's side to stop with one of its wheels in the drain."

One other piece of evidence which must be referred to is the defendant's police statement given in Malay within an hour of the accident. The English translation contained the following passage:

"... I saw a male cyclist coming from the right side of the road from Bakar Arang going towards Sungei Patani. When the cyclist was near me, he crossed towards the left side of the road and collided with my car...."

The trial judge read this as an assertion that the plaintiff had crossed from the defendant's right to his left, and described it as "a vital contradiction" to the defendant's testimony. But in giving the judgment of the Federal Court, Ong Hock Sim F.J. said that there had been a mistranslation of the report and that in truth what the defendant had told the police was, "I saw a male cyclist *riding on* the right-hand side of the road from Bakar Arang going towards Sungei Patani...". The Board has had some difficulty in seeing that the new version makes any substantial difference, but, accepting though it does the substituted translation, the question remains unanswered as to whether when the defendant spoke of "the right-hand side of the road" he was referring to *his* right-hand side or, to the cyclist's right-hand side. And in this context it must not be forgotten that, as has earlier been pointed out, the pleaded defence was that, instead of keeping to his *proper* side of the road, the plaintiff suddenly swerved into the path of the defendant's car, which can only have meant that the plaintiff allegedly came across the road from the defendant's right and proceeded towards his left.

Their Lordships revert to the brake marks, to which the trial judge understandably attached importance. As to these Ong Hock Sim F.J. said,

"... it is agreed that there is no evidence whatsoever to support the finding that the brake marks on photograph 3 ... were made by the motor-car and for the conclusion that the impact took place on respondent's side."

Their Lordships have to say that they are unable to accept this rejection of the photograph. There was indeed no "evidence" called regarding them, for the police photographs and the key thereto were agreed documents and they therefore needed no proof. Furthermore, it is clear that the trial proceeded on the basis that the brake marks *were* made by the defendant's car; for example, the defendant's counsel used them in his closing address to attack the plaintiff's evidence that at the time of the collision the car was pointing in the direction of his nearside grass verge, while the plaintiff's counsel retorted that the defendant was unable to explain how they were made. Not until the defendant's Memorandum of Appeal does the origin of the marks appear to have been challenged. Unfortunately, neither counsel who appeared before the Federal Court was present before the Board and their Lordships are therefore unable to understand how or why the agreement referred to was reached. But their Lordships are quite clear that the trial was conducted on the wholly different basis that the brake marks were those of the defendant's car and were thus directly relevant to the issue of liability.

The Board would nevertheless have seriously considered the suggestion made by respondent's counsel that the case be remitted for re-trial by another judge had it entertained any doubt as to the proper outcome of the appeal. But it has not. This is a perfectly ordinary case arising out of a traffic accident which the trial judge resolved by having regard, as he should, to all the evidence adduced. On behalf of the motorist, it has been said that the learned judge could not make up his mind which of the sharply conflicting accounts of the accident he should accept and that, in accordance with the decision in *San Seong Choy & Ors.* v. *Yuson Bien*,[1] he thereupon proceeded to decide the case on the photographs, plans and the nature of the damage to both vehicles but fell into error in carrying out that exercise. Indeed, the Federal Court said that:

"The *only* issue to be decided is whose version is more probable, adopting the test in *San Seong Choy & Ors.* v. *Yuson Bien.*"

Their Lordships, with all respect, cannot agree, for its adoption involves ignoring the oral testimony of the parties themselves and that of Omar. Counsel for the respondent submitted that the learned trial judge derived no assistance from their testimony and formed no view as to their credibility; otherwise he would have said so, and he did not. As Mr. Lim Kean Chye pithily put it, "The judge used the real evidence to resolve the question of credibility which he had not decided for himself". With respect, nothing could be wider of the mark. In *The Hontestroom*[7] Lord Sumner said (at page 47):

"The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it."

But in fact Syed Agil Barakbah J. *did* express a view about the credibility of the witnesses whom he had seen and heard and, though he rightly proceeded to test their evidence by the other available material, it was on the basis of their testimony that he arrived at the specific finding of fact that the collision occurred on the plaintiff's side of the road. Thus, he referred in his judgment to "the plaintiff's *corroborated* version", which indicated his acceptance of the evidence of the seemingly independent Omar, whose integrity had been directly challenged and whom he could not possibly have regarded as a source of corroboration had he not considered that such challenge had failed.

The percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral testimony must be very small, and this is certainly not one of them. To say that all its features can be wholly explained by accepting one side rather than the other would be inaccurate; for example, the distribution of debris as marked on the sketch-plan is in some respects difficult to comprehend. But the Board entertains no doubt that the oral evidence, and particularly that of Omar, and the manner in which it was given, must have played a dominant part in the formation of the trial judge's conclusion. The Federal Court, though lacking the inestimable advantage of seeing the witnesses, thought fit to say that "Omar lied so brazenly" and that he "continued to lie". But their Lordships have no doubt that this is not one of those rare cases

where an appellate court, lacking the advantage of seeing and hearing the witness, was justified in coming to such a conclusion on credibility. Certainly, the fact that the trial judge's note of Omar's evidence contained after one sentence in brackets the words "corrects evidence" could not possibly provide such justification. Their Lordships have no reason to think that the trial judge "has not taken proper advantage of his having seen and heard the witnesses" (see *Watt or Thomas* v. *Thomas*[8] *per* Lord Thankerton) and they regard it as unthinkable that he would have failed to make clear that he rejected Omar's testimony had he not been satisfied as to its acceptability. The learned judge manifestly regarded it as acceptable, and the Board see no reason why it should do otherwise. Nor, in its judgment, should the Federal Court. If Omar's evidence *is* accepted, counsel for the respondent concedes that his client is bound to fail in this appeal. He is right in making that concession, and their Lordships will accordingly tender to the Yang Dipertuan Agung the advice that the plaintiff's appeal should be allowed, the Order of the Federal Court set aside and the Order of the trial judge restored and that the respondent should pay the costs of the appeal to the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Wilson Freeman; Garters.*

SINGAPORE REPORTS

WORKERS' PARTY v. TAY BOON TOO & ANOR.

[C.A. (Wee Chong Jin C.J., Winslow and Kulasekeram JJ. July 22, 1975]
[Singapore — Civil Appeal No. 41 of 1974]

Defamation — Libel and Slander — Allegation that plaintiffs received money from a foreign country for its election campaign — Speech delivered in Hokkien — Absence of proof of original words — Whether words were defamatory — True or false innuendo.

In this case the appellant had instituted proceedings for slander against the first respondent and libel against the second respondent. It was alleged that the first respondent had stated in a speech at a public rally "that the plaintiff had received a sum of $600,000 from sources outside Singapore for its election expenses". It was also alleged that the Department of Broadcasting had published a statement allegedly made by the first respondent to the same effect. The first respondent had given his speech in Hokkien but no proof of the original or actual words in Hokkien was given. It was also argued that the words used in the broadcast meant and were intended to mean that the plaintiff was acting in the interest of persons who were not citizens of Singapore and that the plaintiff's motives in contesting the election were questionable as to whether they were genuinely to serve the interests of the citizens of Singapore or foreigners. The learned trial judge dismissed the action ([1975] 1 M.L.J. 47) and the appellant appealed to the Court of Appeal.

Held, dismissing the appeal: (1) the learned trial judge was entitled and was indeed bound to regard the absence of proof of the original or actual words in Hokkien as fatal to the appellant's claim against the first respondent;

(2) the trial judge was right in deciding that the words in question were incapable of bearing or of being understood to bear the meanings alleged and that in fact, in their natural and ordinary meaning, they were not defamatory of the appellant.

Cases referred to:-

(1) *Rainy* v. *Bravo* (1872) L.R. 4 P.C. 295.

(2) *Capital and Counties Bank Ltd.* v. *Henty & Sons* (1882) 7 S.C. 741.

COURT OF APPEAL.

J. B. Jeyaretnam and *Lee Tow Kiat* for the appellant.

G. S. Hill and *P. Selvadurai* for the first respondent.

Tan Boon Teik (Attorney-General) and *Warren Khoo* (State Counsel) for the second respondent.

Wee Chong Jin C.J. (delivering the judgment of the Court): The Workers' Party, the appellant in this appeal, is a political party. Tay Boon Too, the first respondent, is a member of the People's Action Party, another political party. He was the People's Action Party candidate for the Paya Lebar constituency at the general election held on September 2, 1972. At that general election the appellant fielded 27 candidates thereby contesting 27 seats out of 65 seats in Parliament. The People's Action Party fielded candidates for all the seats in Parliament.

At an election rally of the People's Action Party held at Lorong Tai Seng on August 25, 1972 the first respondent, Tay Boon Too, was one of many speakers. On the same evening at its regular 11 p.m. news broadcast the Department of Broadcasting broadcast over the radio edited versions of speeches made at several election rallies held by various political parties at various parts of Singapore. One of the edited versions broadcast that evening was the speech made by the first respondent at the election rally at Lorong Tai Seng. Some of the items broadcast over the radio at 11 p.m. on 25th August 1972 were repeated in the